Mohd Said bin Samad v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–10 OF 1994
CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR FCJ AND NH CHAN JCA
9 DECEMBER 1997

Criminal Law *— Dangerous Drugs — Trafficking — Presumption — Whether trial judge erred in invoking presumption of trafficking under s 37(da) based on presumptions of possession and knowledge under s 37(d) — Whether 'found in possession' included presumed possession — Dangerous Drugs Act 1952 s 37(d) & (da)*

Evidence *— Adverse inference — Failure of prosecution to tender search list — List produced and identified under cross-examination — Whether list withheld by prosecution — Whether judge relied on search list — Whether adverse inference should be drawn — Evidence Act 1950 s 114(g)*

The appellant was convicted of trafficking in 639.3gm of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death. The trial judge was satisfied that the appellant was in custody or control of the said cannabis and therefore was deemed under s 37(d) of the Act to have been in possession of the drug and to have known the nature thereof. Furthermore, by reason of the weight of the cannabis, he held that s 37(da)(vi) applied and the accused was deemed to be trafficking in the said drug. The appellant appealed, contending, inter alia: (i) failure to tender the search list relating to the articles seized from the appellant as exhibit. Therefore, the judge ought to have invoked s 114(g) of the Evidence Act 1950 and presumed that the list, if produced, would be unfavourable to the respondent. The failure to produce, it was argued, was fatal to the case for the prosecution; and (ii) the learned trial judge had erred in invoking the presumption of trafficking under s 37(da) of the Act based on the presumptions of possession and knowledge under s 37(d) thereof.

Held, allowing the appeal, quashing the conviction and substituting the death sentence with 12 years' imprisonment and 10 strokes of whipping:

(1) Section 114(g) of the Evidence Act 1950 provides that the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. In the present case, the investigation officer, under cross-examination, produced and identified the search list. There was therefore no question of withholding the list. The appellant could have, at the trial, demanded that it be tendered as exhibit to show materiality, if any, but did not (see p 298G–H); *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 distinguished.

(2) Even where a specified drug reaches the minimum quantity stated in s 37(da) of the Act, the said subsection cannot be rendered applicable merely because the presumption of deemed possession and deemed knowledge of the nature of the drug under s 37(d) had been properly invoked. On the wording 'found in possession' in s 37(da), to validly invoke the presumption of trafficking under the said subsection, apart from meeting the required minimum quantity, there must be an affirmative finding of possession based on sufficient and admissible evidence (see p 300D–E); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 followed.

[Bahasa Malaysia summary

Perayu disabit atas pengedaran 639.3gm ganja, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan dijatuhkan hukuman mati. Hakim perbicaraan berpuas hati bahawa perayu mempunyai jagaan atau kawalan ganja tersebut dan dengan itu dianggap di bawah s 37(d) Akta tersebut sebagai memiliki dadah itu dan mengetahui tentang sifatnya. Tambahan pula, disebabkan berat ganja, beliau memutuskan bahawa s 37(da)(vi) terpakai dan tertuduh dianggap mengedar dadah itu. Perayu membuat rayuan, dengan menghujahkan, antara lain: (i) kegagalan untuk mengemukakan senarai geledah berkaitan dengan barang yang disita daripada perayu sebagai ekshibit. Oleh itu, hakim sepatutnya menggunakan s 114(g) Akta Keterangan 1950 dan menganggap bahawa senarai itu, sekiranya dikemukakan, tidak akan memberi manfaat kepada penentang. Ianya dihujahkan kegagalan untuk mengemuka adalah padah kepada kes pihak pendakwa; dan (ii) hakim perbicaraan yang arif terkhilaf dalam menggunakan anggapan pengedaran di bawah s 37(da) Akta tersebut berdasarkan anggapan-anggapan milikan dan pengetahuan di bawah s 37(d).

Diputuskan, membenarkan rayuan, membatalkan sabitan dan mengganti hukuman mati dengan hukuman penjara 12 tahun dan 10 sebatan:

(1) Seksyen 114(g) Akta Keterangan 1950 memperuntukkan bahawa mahkamah boleh menganggap bahawa keterangan yang boleh dan tidak dikemukakan, jika dikemukakan, tidak akan memberi manfaat kepada orang yang menahannya. Dalam kes ini, pegawai penyiasat, di bawah pemeriksaan balas, telah mengemukakan dan mengenal pasti senarai geledah. Dengan itu tiada persoalan mengenai penahanan senarai itu. Di perbicaraan, perayu boleh menuntut supaya senarai dikemukakan sebagai ekshibit bagi menunjukkan kepentingan, jika ada, tetapi tidak berbuat demikian (lihat ms 298G–H); *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 dibeza.

(2) Biarpun di mana dadah yang ditentukan mencapai kuantiti minima yang dinyatakan dalam s 37(da) Akta tersebut, subseksyen tersebut tidak boleh dijadikan terpakai hanya kerana anggapan

milikan dianggap dan pengetahuan dianggap tentang sifat dadah di bawah s 37(d) telah digunakan dengan wajarnya. Mengenai susunan kata 'didapati ada dalam milikannya' dalam s 37(da), untuk menggunakan anggapan pengedaran di bawah subseksyen tersebut secara sah, selain daripada memenuhi kuantiti minima yang dikehendaki, mesti terdapat keputusan yang mengiakan atas milikan berdasarkan keterangan yang mencukupi dan boleh diterima (lihat ms 300D–E); *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 diikut.]

Notes

For cases on adverse inference, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 77–119.

For cases on the Dangerous Drugs Act 1952 s 37(d) and (da), see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 49–52.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (distd)
Leong Bon Huat v PP [1993] 3 MLJ 11 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37(d), (da)(vi), 39B(1)(a)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 47–28 of 1990 (High Court, Kota Bharu)

Latifah Ariffin (*Latifah Ariffin & Co*) for the appellant.
Mohd Yusof Hj Zainal Abidin (Attorney General's Chambers) for the respondent.

Chong Siew Fai CJ (Sabah & Sarawak) (delivering judgment of the court):

Introduction

On 30 January 1994, the appellant was convicted of trafficking in 639.3gm of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death. The offence was alleged to have been committed on 20 July 1990 at about 5.40pm in a bus shelter in Kampung Alor Pasir, Pasir Mas, Kelantan. The appellant appealed. On 26 July 1997, we allowed the appeal, quashed the conviction and set aside the death sentence. In place thereof, we entered a conviction under s 6 of the Act and sentenced the appellant to a term of imprisonment of 12 years with effect from the date of his arrest and 10 strokes of whipping. We indicated that reasons for the judgment would be given later, which we now do.

Case for prosecution

Briefly, the case for the prosecution may be summarized as follows.

On 20 July 1990 at about 5.40pm, PW5 ASP Anuwar bin Naemat led a police party, including PW6 Corporal Majinan Sani to a bus shelter in Kampung Alor Pasir in a car. At the bus shelter, PW5 saw PW2, Awang bin Teh, a fruit seller, and the appellant who was holding a blue and black bag (exh 14). PW5 got down from the car and pretended to be interested in buying some pineapples. Upon his enquiry, PW2 said each pineapple cost RM2. Thereupon PW5 immediately approached the appellant and asked him about the contents of the bag (exh 14). When two of his men alighted from the car and joined him, PW5 seized and opened the bag and found therein, inter alia, three packages wrapped in newspaper, each package containing a slab of dried plant material that had been split into two. Subsequently, PW5 also found inside the bag (exh P14) a brown waist pouch (Exh P20) containing, inter alia, the appellant's wallet, international passport, account book and a tin of 'Code 10' hair cream. The appellant was arrested and brought to the Rantau Panjang Police Station. PW5's evidence about the arrest was substantially corroborated by PW6 and PW2. PW1, Lim Ah Lee, the chemist, testified that after analysis, the contents of the three packages were cannabis as defined in s 2 of the Act, weighing 186.7gm, 218.8gm and 233.8gm respectively totaling 639.3gm.

On the above evidence, the learned trial judge ruled that a prima facie case had been made out and called on the appellant to enter upon his defence. He was satisfied that the appellant was in custody or control of the said cannabis and therefore was deemed under s 37(d) of the Act to have been in possession of the drug and to have known the nature thereof. Furthermore, by reason of the weight of the cannabis, he held that s 37(da)(vi) applied and the accused was deemed to be trafficking in the said drug.

Defence

The appellant gave sworn evidence.

In essence, his defence was that the bag (exh P14) was not the one he carried. He claimed that on 20 July 1990 at about 3pm in his sister's house in Golok he bought RM30 worth of ganja for his own consumption from two friends. The ganja was wrapped in a package (as opposed to the three packages stated by PW5) which he put in a green bag (as opposed to the blue and black bag (exh P14) described by PW5). The appellant claimed that when he was arrested, the bag seized from him was the green bag and not exh P14. He, however, denied that he was a drug addict.

Judgment

The learned trial judge disbelieved the story of the appellant. He found that the defence had not raised any reasonable doubt on the prosecution's case, there being no reason why PW5 would frame the appellant by

switching the bags since both of them did not previously know each other. The learned trial judge rationalized that instead of changing the bags, PW5 could have easily put the three packages of cannabis in the bag the appellant allegedly carried if PW5 had really wanted to plant the cannabis on the appellant. The learned trial judge considered the story of the appellant carrying a different bag at the time of his arrest no more than a ruse intended to confuse the court. He held that the appellant had failed to rebut the statutory presumptions under s 37(d) and (da) on a balance of probabilities and found him guilty as charged.

Appeal

Before us, learned counsel for the appellant submitted, firstly, that the learned trial judge, at the close of the case for the prosecution, had failed to consider the elements of possession and knowledge, and the application of s 37(d) of the Act (ie the presumptions of possession of the drug and knowledge of the nature thereof).

We found no substance in the contention. A perusal of the judgment clearly showed that the learned trial judge not only had applied the said s 37(d) but also had, by virtue thereof, invoked s 37(da) of the Act. We shall say more about the application of the double presumptions under the two subsections at a later stage.

Next it was contended, though somewhat feebly, that the analysis of the plant material by the chemist, PW1 Lim Ah Lee, was unsatisfactory. *Leong Bon Huat v PP* [1993] 3 MLJ 11 (SC) was cited in support. In that case, the results of the physical examination and the microscopic examination of the plant material were not made known. Neither was it clear whether the dequenois levine test and the thin layer chromatography test were carried out. What the chemist had said of relevance was '... the total weight of samples taken for analysis was more than 10% of the net weight of 793.85 gm'. On the other hand, in the instant appeal before us, the chemist had carried out a 100% check of the plant material by both physical and microscopic examinations, as well as examined 20 random samples thereof by dequenois levine test and the thin layer chromatography test. He explained in some detail the four tests and the purposes thereof. From the former two tests, the chemist found botanical and morphological features peculiar to cannabis as well as a lot of cannabis resins in the plant material. From the latter two tests, he found high concentration of cannabis resins in the 20 samples. Based on the four tests, he concluded that the plant material seized was 'cannabis as is defined in s 2 of the Dangerous Drugs Act 1952'. The evidence of the chemist amply established that the plant material was cannabis.

We saw no merit in this ground.

Thirdly, the complaints on behalf of the appellant were:

(1) the presence of six packages of cannabis of which only three were marked; and

(2) the missing of the tin of 'Code 10' hair-cream recovered from the waist pouch (exh P20).

A We found no merit in the complaints.

As to (1) above (the six packages), it was in evidence that, upon initial discovery, the cannabis was wrapped in three packages but, upon being opened, each of the three packages was found to have already been split into two halves. This accounted for the presence of the so-called six B packages. As to the markings, these were done by PW5 ASP Anuwar on the newspaper wrappings after the two halves of each of the packages were restored to the position as initially found. This explained why only three packages were marked.

As regards (2) above (the missing tin of 'Code 10' hair cream), the C respondent frankly admitted at the trial that its disappearance could not be accounted for. However, it was not contended before us, and we failed to see how this could have in any way prejudiced the case of the appellant. It was not submitted, let alone shown, what materiality or connection the tin of 'Code 10' hair cream bore with the three packages of cannabis recovered save that both were found in the same bag (exh P14).

D Next, it was argued that the learned trial judge did not at all, consider whether the cannabis was for the appellant's own consumption. We rejected this argument. It must be noted that the case of the appellant was not that the cannabis seized was for his own consumption. In his defence, he said that he bought from his friends RM30 worth of cannabis (which, according E to him, was not the cannabis seized) for his own consumption and that he put it in a green bag. The learned trial judge rejected his story. Such rejection must necessarily mean that the appellant's version of purchasing the RM30 worth of cannabis for his own consumption was disbelieved.

Furthermore, relying on the failure to tender, as exhibit, the search-F list prepared by PW5 relating to the articles seized from the appellant, learned counsel for the appellant submitted that the learned trial judge ought to have invoked s 114(g) of the Evidence Act 1950 and presumed that the list, if produced, would be unfavourable to the respondent. The failure to produce, it was argued, was fatal to the case for the prosecution. *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 was cited in support.

G We saw no merit in this contention.

Illustration (g) of s 114 of the Evidence Act 1950 provides that the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. In the present case, investigation officer, PW7 ASP Zulyadeen bin Hj Ismail, H under cross-examination, produced and identified the search list. There was therefore no question of withholding the list. Counsel for the appellant could have, at the trial, demanded its being tendered as exhibit to show materiality, if any, but did not.

Alcontara a/l Ambross Anthony v PP is distinguishable. There the trial I judge relied on the search list to resolve the conflict in evidence whereas in the instant case before us, the learned trial judge did not rely on the search list at all.

Finally, it was contended that the learned trial judge had erred in invoking the presumption of trafficking under s 37(da) of the Act based on

the presumptions of possession and knowledge under s 37(d) thereof. In his judgment, the learned trial judge found the appellant to be in custody or control of the cannabis and, by virtue thereof, to have been in possession of the drug and to have known the nature thereof under s 37(d) of the Act. The learned trial judge went further and said that because of the weight of the drug, s 37(da)(vi) (ie the presumption of trafficking) applied. He subsequently found the presumptions under both subsections unrebutted.

For this ground, learned counsel for both sides adopted the submissions of their respective learned colleagues in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273. For the respondent, however, it was further contended that the words 'found in possession' in s 37(da) included presumed possession.

We do not propose to repeat what we had said on this point in *Muhammed bin Hassan*, save that we rely on the reasons given therein and that in our opinion, even where a specified drug reaches the minimum quantity stated in s 37(da) of the Act, the said subsection cannot be rendered applicable merely because the presumption of deemed possession and deemed knowledge of the nature of the drug under s 37(d) had been properly invoked. On the wording 'found in possession' in s 37(da), it is our view that to validly invoke the presumption of trafficking under the said subsection, apart from meeting the required minimum quantity, there must be an affirmative finding of possession based on sufficient and admissible evidence.

Conclusion

To sum up, we found no merit in all the grounds except the one lastly mentioned. We had accordingly quashed the conviction, set aside the death sentence, and substituted therefor a conviction and sentence as stated earlier in this judgment.

Appeal allowed, conviction quashed and death sentence substituted with a sentence of 12 years' imprisonment and 10 strokes of whipping.

Reported by Jafisah Jaafar